IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1980

No. 80-1017

EMMANUEL LOUCAS, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Petition For a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JAMES F. COMPANION, ESQUIRE
Schrader, Stamp, Byrd, Byrum,
Johnson & Companion
816 Central Union Building
Wheeling, WV 26003
(304) 233-3390
Attorney for Petitioner

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ARGUMENT

I.

Respondent's Brief Filed Out of Time and Cannot Be Considered

According to Rule 22.1 of the Supreme Court Rules, the respondent has 30 days in which to file a brief in opposition to a petition for writ of certiorari, unless the time is enlarged by the Court or a Justice

thereof or by the Clerk.

The petition for writ of certiorari in this case was docketed by the Clerk on December 19, 1980, and three copies of the petition were duly served by United States mail upon the respondent on that date. The time within which the respondent had to file his opposing brief expired on or about January 21, 1981, and the time for filing was not enlarged in any way set forth above.

Nevertheless, the respondent filed its brief some six weeks late, the same having been received by counsel for the petitioner on March 11, 1981. Rule 22.1 explicitly states, "The Clerk shall not accept a brief which does not comply with this Rule . . ." Attempting to file outside the 30-day limit is not complying with the Rule; therefore, this Court, which certainly expects private counsel and litigants to adhere to the Rules, must require the same, if not stricter, allegiance from the government's attorneys. As Rule 22.1 contemplates, this Court should direct the Clerk to reject the government's

brief and, of course, give no consideration to it.

II.

Response to Government's Statement (Brief 1-3)

Neither party in this case has deemed it essential to request certification of the record as provided in Rule 19.1 of the Supreme Court Rules; nevertheless, the respondent's statement cites quite liberally from portions of the record. In referring to the record, respondent, however, has overlooked the salient point that the bribery charge against Loucas was embodied only within the conspiracy count, the count under which he was acquitted. (C.A. App. 5-11).

The aiding and abetting count, upon which Loucas was convicted, alleges that four underlying statutes of the State of West Virginia were violated. (Pet. App. 27a). None of these statutes relate to bribery, and as previously argued by Loucas, the government failed to prove a violation of any one of those statutes. Nevertheless, the Fourth Circuit ruled that all the government had to prove was

that an underlying State statute "could have been violated." (Pet. App. 7a).

The suggestion that recovery of Pinciaro's slot machines was done for the purpose of enabling him to dominate illegal gambling activities in Hancock County, West Virginia, is simply not supported by the record. Throughout the entire period of time alleged in the indictment, that is, from June, 1976, through November 19, 1978, Pinciaro was interested in acquiring locations for his pinball machines and not his slot machines. (C.A. App. 106-107, 112-113, 119C-119D, 119J, 126-127, 136, 216-218).[1] What Pinciaro untimately was going to do with the slot machines is not ascertainable from the record in this case. All that can be determined about those machines is that they were in storage when the sheriff first saw them

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[1]At page two of its brief filed in the Fourth Circuit, the government said, "The government believes that defendant Loucas has fairly set forth the facts in his brief and will not repeat a Statement of Facts . . . "

in November, 1977, and they were placed back in storage on November 19, 1978, when Pinciaro retrieved them from the sheriff. To suggest that Pinciaro's retrieval of his slot machines was an attempt to violate the West Virginia gaming device statute on the kind of historical record in this case is pure speculation not supported by any factual foundation.

III.

Response to Government's Argument (Brief 3-8)

A. Conflict Among Circuits On Knowledge Required by Aider and Abetter For Conviction Under Travel Act, 18. U.S.C. §1952(a)(3)

The government attacks the petitioner's argument on two grounds, neither of which is tenable. First, the petitioner's failure to offer an instruction on the knowledge requirement does not eliminate the requirement or absolve the government from offering proof of the essential elements of a crime. Furthermore, such an instruction, in light of the present law in the Fourth Circuit, would not have been given any way.

Secondly, and again citing liberally but not accurately from a record which is not before this Court, the government argues that the evidence was sufficient to show that Loucas knew that Pinciaro travelled in interstate commerce on the day he retrieved his slot machines. In the first place, the government made no conscious or determined effort to prove the knowledge aspect. Also, much emphasis is placed on the position of trust which Loucas and Pinciaro allegedly shared by virtue of their attorney-client relationship. However, this does not lead to the inference that Loucas knew where Pinciaro resided or that he travelled in interstate commerce on the day the slot machines were retrieved.[2]

B. Proof of Underlying State Statute for Conviction Under Travel Act

In addition to the points raised under

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[2] One point overlooked by the government in referring to the record is that Loucas' law office and Pinciaro's place of business were located on the same street in Weirton, West Virginia, within eyesight of each other. (C.A. App. 46, 50). Thus, Loucas would not need to know Pinciaro's home address in order to make contact with him.

Item II of this reply brief, the petitioner again points out that the alleged bribery scheme was not a part of the aiding and abetting count. The bribery charge, West Virginia Code, §61-5A-3, was only included in the conspiracy count which resulted in an acquittal.

Furthermore, the government's brief fails to speak to the virtual "rewriting" of the Travel Act by the insertion of the words "could have." Applying those words to the Loucas case, the Fourth Circuit actually held that Loucas is guilty because his principal, Pinciaro, could have used the slot machines in violation of West Virginia law. Just as consistent, however, is the inference that Pinciaro could have used those machines without violating West Virginia law.[3]

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[3] As stated in State v. 25 Slot Machines, 256 S.E. 2d 595, 598 (W. Va. 1979), "Gambling devices under Code, 61-10-1 are not per se illegal."

C. Implied Bias Sufficient Reason to Strike Jurors For Cause

Contrary to the government's assertion, the case of United States v. Stevens, 444 F. 2d 630 (6th Cir. 1971), gives stronger support to the implied bias theory than the government is willing to concede. In Stevens, the defendant failed to object to the array before the jury was impaneled, and that failure had considerable influence in leading the court to affirm the conviction. In the instant case, counsel for Loucas did move to strike the four jurors for cause. (C.A. App. 72-76).

In a footnote, the government is apparently attempting to justify the use of the same two prosecutors because only two federal prosecutors work in Wheeling, West Virginia. That argument has no credibility. In the Northern District of West Virginia, the four federal prosecutors try cases in all six points of holding court within the district. Furthermore, the Department of Justice commonly dispatches attorneys to try special cases and, frequently, Assistant

United States Attorneys from other districts are detailed to help out in districts which are understaffed or need assistance for any of a variety of reasons.

Conclusion

For the foregoing reasons, the petitioner respectfully requests this Court to disregard the government's untimely-filed brief and to issue a writ of certiorari to review the judgment and opinion of the Fourth Circuit.

RESPECTFULLY SUBMITTED,

JAMES F. COMPANION, ESQUIRE
Schrader, Stamp, Byrd, Byrum,
Johnson & Companion
816 Central Union Building
Wheeling, West Virginia 26003
(304) 233-3390

Attorney for Petitioner

March 16, 1981.